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TRANSFERS OF AFTER-ACQUIRED PERSONAL PROPERTY.

THE effect of a contract to sell, pledge, or mortgage personal property which either has not been identified or has not come into existence at the time — "future goods," as the English Sale of Goods Act calls such property[1] — is not the same in all jurisdictions. This is partly due to the fact that several legal principles bear upon the question which are themselves the subject of much dispute.

Of course the party aggrieved has an action at law for damages if such a contract is broken, but the troublesome question is, whether equity will base upon this contract a property right, and if so, of what nature and to what extent. Such rights conceivably might be granted on either of two grounds: (1) the enforcement of specific performance of the contract, resulting in effect in an equitable lien upon the property; (2) the imposition of an equitable lien upon the property, — not upon principles of specific performance, but on a broad and somewhat indefinite principle that one who has parted with money or property expecting a specified return should be assured either that return or the redelivery of what he parted with. On this ground in England and in some states of this country an equitable lien is given on real estate for the purchase price both to an unpaid vendor,[2] and to a vendee who has paid the price or a portion of it in advance.[3]

A further question also is necessary. If an equitable right in the property does arise, is it available against the creditors or trustee

[1] Sec. 5 (1).

[2] Jones on Liens, § 1061 *et seq.*

[3] *Ibid.*, § 1105 *et seq.; Re* Peasley, 137 Fed. Rep. 190.

in bankruptcy of the legal owner? Generally an equitable right in property prevails over any one but a purchaser for value without notice. It will appear later, however, that there may be reasons for a different rule in the case of future goods.

The most common dealing with future goods is by way of mortgage. Sometimes the mortgagor in terms contracts to mortgage the goods when acquired. More commonly, however, he purports to make a present conveyance by way of mortgage of the property. But, in the nature of the case, since a present transfer is impossible, this can mean nothing more than a promise to mortgage, while justice and the presumable intention of the parties require that it should mean as much as a promise.[1]

It is necessary in a discussion of mortgages of future goods to distinguish sharply agreements to mortgage real estate or property which is to be, and subsequently is in fact, attached to realty, itself subject to mortgage. The rules of real property are not the same either at law or in equity as those governing personal property.

Agreements to mortgage or sell property of another sort must also be distinguished. The doctrine was laid down in the early case of Grantham *v.* Hawley,[2] that crops of specified land, the wool to be clipped in the future from specified sheep or the future young of specified animals, can be bargained and sold at law, because the seller has "potential possession." The effect of this doctrine, obviously based on a fiction, is not only that the legal title to the future property passes to the buyer as soon as the property comes into existence, but that this title is regarded as relating back to the time of the agreement. Carried to its full extent the doctrine would enable the owner of land or of animals to dispose of the crops or the young for any period of time in advance, and the disposition would be good against a *bona fide* purchaser of the land or of the parent animals as well as against similar purchasers of the crops and of the young animals. Though the doctrine seems to have been rarely invoked no limitation of it was ever suggested in England by the courts. In 1846 it was applied against an attaching creditor of crops who was deprived of the

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1 "An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer and make good that right or interest, which is made good here by way of agreement." Lord Hardwicke, Wright *v.* Wright, 1 Ves. 409, 411.

2 Hob. 132 (1616).

property attached because it had been mortgaged by the occupant of the land before it came into existence.[1] Since this decision the doctrine does not seem to have been referred to in the English reports, and the Sale of Goods Act apparently discards it by providing in Section 5 (3) that "where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods." No exception is here made in favor of property which at common law was the subject of potential possession. Whether this was intentional or accidental is not wholly clear, since the draftsman of the Act, Judge Chalmers, makes no reference to the matter in his annotations of the Act. The abolition of the doctrine is wise. If the ordinary doctrines applicable to real and personal property do not afford as much protection as is desirable to transactions relating to crops or animals, the extent of the rights of a seller or mortgagee should be exactly defined and more closely limited than is done under the doctrine of potential possession. There is no reason why such transactions should enjoy peculiar protection to the possible prejudice of innocent creditors or purchasers.

In this country the situation is somewhat peculiar. The courts generally profess to follow the doctrine of Grantham *v.* Hawley, but when a case arises involving the distinction between an equitable right and a legal title, the case is generally dealt with as if the transfer of the future property created an equitable right only. The rules applied in different states differ considerably, and the varying laws governing recording and delivery have an important bearing upon the matter; but in few states in this country would Grantham *v.* Hawley be followed to its logical limits, that is, to the extent of holding that a transferee of non-existing property of this sort acquires a legal title good against all the world to the property when it comes into existence, perhaps many years after the agreement to transfer.

Though in this country the doctrine of potential possession is thus limited in its effects, it introduces an element of which account must be taken in cases within its scope. Such cases, therefore, are not generally here considered in dealing with the subject of equitable rights acquired by a contract to mortgage or sell future goods.

As to future goods which are not involved with the law of real

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[1] Petch *v.* Tutin, 15 M. & W. 110.

estate or potential possession, the great case which settled the English law is Holroyd *v.* Marshall,[1] decided by the House of Lords in 1861. Though earlier English decisions had gone far in the same direction, and Judge Story in 1843,[2] relying on these earlier decisions, had anticipated in this country the result finally reached in England, it was not until the judgment in Holroyd *v.* Marshall[1] was rendered that it was clearly established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired, good against all but purchasers for value. Lord Campbell, sitting alone, had held that some "*novus actus interveniens*" was needed to make good the mortgagee's right,[3] but the House of Lords reversed his decree and held that from the time when the property was acquired an equitable right attached to it which would prevail over any one except purchasers for value without notice. This doctrine has been frequently applied in more recent years in England.[4]

The grounds upon which the doctrine rests are not very clearly stated. It is most commonly regarded as an application of the principles of specific performance,[5] and it is evident that what is actually done is to enforce the mortgagor's agreement that his future property shall be mortgaged or stand as security. The occasional denial that the case is one of specific performance is due partly to the fact that the mortgagor often uses no words of promise, but purports to transfer presently, and partly to the fact that the court does not order the execution of any mortgage. But the mortgagor promises impliedly, as has been previously shown, and the court does not order the execution of a mortgage only because it is unnecessary. It is essential that the mortgagee shall have actually advanced his money. If the contract is wholly executory, the doctrine of Holroyd *v.* Marshall is not applicable.[6]

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1 10 H. L. Cas. 191.

2 Mitchell *v.* Winslow, 2 Story (U. S. C. C.) 630.

3 2 De G. F. & J. 596. Lord Campbell relied on Lord Bacon's maxim, *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio praecedens quae sortiatur effectum interveniente novo actu.*

4 Collyer *v.* Isaacs, 19 Ch. D. 342; Coombe *v.* Carter, 36 Ch. D. 348; Tailby *v.* Official Receiver, 13 A. C. 523; Cumberland Banking Co. *v.* Maryport Iron Co., [1892] 1 Ch. 415; Governments Stock & Investment Co. *v.* Manila Ry. Co., [1897] A. C. 81; *In re* Yorkshire Woolcombers' Assoc., [1903] 2 Ch. 284; Edward Nelson & Co. *v.* Faber, [1903] 2 K. B. 367.

5 See cases below *passim*.

6 Tailby *v.* Official Receiver, 13 A. C. 523, 543, 546.

Specific performance of an express contract to mortgage existing property granted against the promisor, though the cases are not numerous and the reasoning on which they are based is not always conclusive.[1] The result seems sound, however, because damages are not an adequate remedy for a promise to give security. It must always be problematical what the promisee's pecuniary injury is. The problem depends on the value of the security and the solvency of the debtor at the time when the debt is due. The factors are too indeterminate to make the legal remedy satisfactory.

The question of the effect of attempted dealings with future goods is generally regarded as dependent on rules of equity, and in most of the cases that arise no doubt the legal title to the property could not have passed. It should be observed, however, that it is perfectly easy to draw an agreement in such a way that legal title to future chattel property will pass. The ordinary doctrines of appropriation by one who has agreed to sell unspecified property can easily be made to cover the case. Any act of appropriation by the seller which has been assented to by the buyer in advance suffices to pass title.[2] The commonest class of cases illustrating this is where goods of a specified kind are ordered and are delivered to a carrier in accordance with the order.[3] The same principle is applied though the goods remain wholly in the seller's control.[4] Consequently, if an agreement between mortgagor and mortgagee provides, for instance, that the title to all goods put by the mortgagor upon his shelves or brought by him upon his premises shall be regarded as thereby appropriated to the mortgagee, on principle the title must pass to the mortgagee,[5] except in so far as the effect of recording acts and the doctrines hereinafter considered may invalidate such a title.

The question in Holroyd *v.* Marshall related to all machinery thereafter placed in a certain mill; but later decisions applied the same principle to property included under broader terms, and in England it now seems established that, apart from the statutes hereafter

[1] Ames, Cas. Eq. Jur., 61.

[2] The English Sale of Goods Act expressed this principle in Section 18, Rule 5.

[3] Mechem on Sales, § 733 *et seq.*

[4] Pletts *v.* Beattie, [1896] 1 Q. B. 519; Tift *v.* Wight, etc., Co., 113 Ga. 681; Weld *v.* Came, 98 Mass. 152; Mitchell *v.* Le Clair, 165 Mass. 308; Leggo *v.* Welland Vale Mfg. Co., [1901] 2 Ont. L. Rep. 45.

[5] This is discussed in Sawyer *v.* Long, 86 Me. 541. See also Lunn *v.* Thornton, 1 C. B. 679; Holly *v.* Brown, 14 Conn. 255; Dexter *v.* Curtis, 91 Me. 505.

referred to, a mortgagor may promise to mortgage all property of any kind which he may thereafter acquire. Most of the cases which go to this extent are cases of corporate mortgages,[1] but the same result cannot be avoided if an individual mortgagor made the grant.[2] Indeed, in Tailby *v.* The Official Receiver,[3] the mortgage included all property in any place where the mortgagor might carry on business, and all book debts owing to the mortgagor during the continuance of the mortgage. It is true that all the cases agree that the description of the property must be sufficiently exact to make the identification of the property certain when a right in it is claimed, but this requirement is not inconsistent with the enforcement of descriptions in the broadest and most inclusive language.

Furthermore, the convenience of the parties frequently requires that the mortgagee shall be allowed to sell or use as his own both the property which was originally subject to the mortgage and that which afterwards from time to time became subject to its terms. Sometimes the proceeds of such sales are required by the terms of the instrument to be used in the purchase of other property to take the place of that which has been sold, but frequently the mortgagor is not so restricted. He may covenant generally that he will keep a certain amount of property on hand subject to the mortgage, but in many cases he makes no such covenant. The mortgagee accepts such security as the property on hand within the terms of the mortgage may chance to afford when payment is required.

The doctrine of Holroyd *v.* Marshall has been applied not only to chattels, but to choses in action.[4] The analogy between choses

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[1] See case cited *infra*, p. 566 n. 7.

[2] This is so held in regard to existing property. In *In re* Kelcey, [1899] 2 Ch. 530, a charge as security for borrowed money on all the existing property of the borrower of every kind was sustained, and was held to give effectual security against the borrower's other creditors. Kekewich, J., said (p. 534), "It may be that it would be a great advantage that charges of this kind should not be allowed to take effect — that is to say, that there should be, for instance, a register of all charges on all property, and that fraud should be thereby rendered, so far as can be, impossible, and that even something short of what most people call fraud should be prevented, namely, confusion in ownership; but hitherto that has not been the policy of English law, except to a very small extent."

[3] 13 A. C. 523.

[4] Tailby *v.* Official Receiver, 13 A. C. 523; Pullan *v.* Cincinnati, etc., R. R. Co., 5 Biss. (U. S. C. C.) 237; Burdon, etc., Sugar Ref'g Co. *v.* Ferris Sugar Mfg. Co., 78 Fed. Rep. 417, 81 Fed. Rep. 663, 167 U. S. 127; *Re* Marine Construction Co., 14 Am. B. Rep. 466; Jessup *v.* Brown, 11 Ia. 572; Sandwich Mfg. Co. *v.* Robinson, 83 Ia. 567; Riddle

in action and chattels is, however, not so perfect as seems to be assumed by the decisions. The legal title to existing chattels of the mortgagee can be presently transferred, but cannot be to chattels subsequently to be acquired without further action of the parties. This rule is what gives the court of equity its opportunity. The legal right even in existing choses in action, however, cannot be transferred. The practical effect of assignment of such property is produced whether the parties so state or not, by the authority or power of attorney which the owner of the claim gives to the assignee to collect it and keep the proceeds. It is impossible to suggest a reason why the same principles are not applicable to choses in action subsequently to be acquired. One may make another his attorney to collect a debt which is coming into existence tomorrow, as readily as to collect one already in existence. There is, therefore, no reason why equity should have treated an assignment of future debts in any different way from an assignment of present debts. The power given the assignee expressly or impliedly should be sufficient to enable him to enforce his rights at law either in the name of the assignor or, under modern statutes, in his own name.

There seems no reason to question seriously the propriety of the equitable relief which the English courts give against the person who contracts to mortgage property which he may thereafter acquire. The only possible question is whether public policy should set any limits to the power of a man to bargain away not only all that he has but all that he ever may have. On ordinary principles a natural consequence of the right against the mortgagor is a similar right against every one except a *bona fide* purchaser for value without notice, and Holroyd *v.* Marshall, in fact, decides

v. Dow, 98 Ia. 7; Edwards *v.* Peterson, 80 Me. 366; Schubert *v.* Herzberg, 65 Mo. App. 578; Williamson *v.* New Jersey Southern, etc., R. R., 26 N. J. Eq. 398; Clay *v.* East Tenn. R. R. Co., 6 Heisk. (Tenn.) 421. See also 70 L. R. A. 338 n; but a mortgage of future earnings is generally held not good against creditors until the mortgagee takes possession. Galveston Railroad *v.* Cowdrey, 11 Wall. (U. S) 459; Gilman *v.* Ill. & Miss. Tel. Co., 91 U. S. 603; Amer. Bridge Co. *v.* Heidelbach, 94 U. S. 798; Sage *v.* Memphis, etc., R. R. Co., 125 U. S. 361; U. S. Trust Co. *v.* Wabash Western Ry. Co., 150 U. S. 287, 307; M. V. & W. Ry. *v.* U. S. Express Co., 81 Ill. 534; Ellis *v.* Boston, etc., R. R. Co., 124 Mass. 155; De Graff *v.* Thompson, 24 Minn. 452; N. Y. Security Co. *v.* Saratoga Gas Co., 159 N. Y. 137. In some jurisdictions also the right to assign a future claim is denied when the claim is not only not due, but there is no existing contract from which the claim is expected to arise. Lightbody *v.* Smith, 125 Mass. 51; Eagan *v.* Luby, 133 Mass. 543; Lehigh Co. *v.* Woodring, 116 Pa. 513; O'Neil *v.* Kerr Co., 124 Wis. 234.

that such contracts give a lien upon the property to which they relate enforceable against creditors, and it is the effect of the doctrine upon creditors and trustees in bankruptcy that makes the subject one of more than occasional importance.

It is evident that general creditors are likely to be defrauded by the almost unlimited power that the right to make effective mortgages of future property gives to a debtor, who may in this way secure particular creditors while himself retaining the possession of his property, and not only all the apparent incidents of ownership, but all the actual incidents, with the single exception that the mortgagee after the maturity of the mortgage may at any time seize the property then remaining. The difficulty may be met by legislation dealing with the specific question, and this course has been adopted in England, but not generally in this country.

There are here, however, several doctrines which may be infringed by the allowance of these equitable liens:

1. Recording acts require chattel mortgages to be recorded or the possession of the chattels to be transferred.

2. Chattel property which is transferred but of which possession is retained by the seller, in many jurisdictions even apart from the provisions of recording acts, may be seized by the seller's creditors.

3. It is often held to make a mortgage fraudulent, if the mortgagor is allowed by the terms of the mortage or by the agreement of the parties to withdraw from the mortgage the property covered by it, at his pleasure, and sell the property as his own.

4. The Bankruptcy Act forbids preferences, and the policy of the Act is to secure equality of distribution among the bankrupt's creditors.

On all these subjects the law of England differs considerably from that in force in most states of this country, and an examination of our law in these particulars is necessary in order to reach a proper conclusion as to the propriety of our courts following the precedent of Holroyd *v.* Marshall.

The English legislation specifically dealing with the matter is contained in the Bills of Sale Act of 1878.[1] Section 4 of that Act requires as a condition of the validity of a bill of sale, except

[1] 45 & 46 Vict. c. 43. . Bill of sale is used in England as the name not only of an instrument transferring title absolutely to the grantee, but also and more commonly of an instrument transferring title conditionally as security only, which would be called in America a chattel mortgage.

as against the grantor, a schedule to be attached containing an inventory of the chattels granted. The statute then proceeds:

"Section 5. Save as hereinafter mentioned a bill of sale shall be void except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

"Section 6. Nothing herein contained in the foregoing sections shall render a bill of sale void in respect of any of the following things: (that is to say)

"(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

"(2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

Section 9 provides that a bill of sale not in accordance with the form provided in the act "shall be void." This form is appropriate to the transfer of existing property only. Accordingly the House of Lords has held[1] that a bill of sale which attempts to include besides specifically described existing property, future goods under a general description, is void, not only as to the future property but as to the existing property, and even between the parties.

This statute, therefore, not only makes ineffectual attempts to transfer future goods by writing, either absolutely or as security, but imposes a heavy penalty on the attempt to do so by general description by invalidating any transfer of existing property contained in the same instrument. In several particulars, however, the statute does not cover the whole ground of future transfers.

1. The express exception of the statute in section 6 permits transfer of two kinds of future goods.

2. There is nothing in the English law requiring an agreement to transfer chattel property to be in writing, and if not in writing the Bills of Sale Acts are not applicable.[2]

3. The operation of these acts, including that under special consideration, is confined to "personal chattels" as therein defined.[3] This term includes "goods, furniture, and other articles

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[1] Thomas *v.* Kelly, 13 A. C. 506.

[2] 2 Encyc. of the Laws of England 129.

[3] 41 & 42 Vict. c. 31, sec. 4.

capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops." Shares of stock and choses in action of all kinds are expressly excluded. A mortgage of all book debts which may be due to the mortgagor at any time in the future is, therefore, still valid.[1]

4. The Bills of Sale Acts exempt from their operation[2] transfers of chattels by marriage settlement, by transfer in the ordinary course of business of any trade, by bills of sale of goods in foreign ports or at sea, bills of lading, India warrants, warehouse receipts, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing the possessor of the document to transfer or receive goods thereby represented. This opens a wide door.[3]

5. Mortgages or charges made by incorporated companies are not within the Bills of Sale Acts. This is partly due to an express statutory provision[4] and partly because special provision is made in the Companies Acts for the registration of such mortgages and charges.[5] Accordingly mortgages in the most general terms, usually in the form of debentures, are in use in England and are upheld.[6] A common form provides for a charge in favor of the debenture holder upon all property of every kind which the company then has or may thereafter acquire, but the company may use and deal with the property as its own to the fullest extent until default or insolvency or cessation of business. This is called a floating charge, and it will be seen that it amounts practically to nothing more than an agreement that in case the

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1 See Tailby *v.* Official Receiver, 13 A. C. 523, where, however, the mortgage in litigation had been made prior to the passage of 41 & 42 Vict. c. 31.

2 41 & 42 Vict. c. 31, sec. 4.

3 In *Re* Hamilton, [1905] 2 K. B. 772, unrecorded "letters of lien" upon certain goods in the possession of the debtor were held to give the creditor a valid lien when the debtor became bankrupt. The letters were simply undertakings by the debtor on printed forms to hold certain goods until shipment subject to a lien in favor of the creditor, and upon shipment to transfer the bills of lading to the creditor. The Court of Appeal held that the letters of lien were "documents used in the ordinary course of business as proof of the possession or control of goods," which the Bills of Sale Acts except from the requirement of record.

4 45 & 46 Vict. c. 43, sec. 17.

5 *Re* Standard Mfg. Co., [1891] 1 Ch. 627.

6 Governments Stock and Investment Co. *v.* Manila Ry. Co., [1897] A. C. 81; *Re* H. H. Vivian and Co., [1900] 2 Ch. 654; *Re* Borax Co., [1901] 1 Ch. 326; Edward Nelson and Co. *v.* Faber, [1903] 2 K. B. 367; *Re* Yorkshire Woolcombers' Assoc., [1903] 2 Ch. 284. See further 4 Encyc. of Laws of England 147.

debtor has not sufficient assets to pay all his creditors, the debenture holders shall be preferred.

If the English precedents should be followed in this country, there would be no qualification of the power to mortgage future goods in most jurisdictions, since there are few statutes directly relating to such mortgages. There are, however, as has been indicated, doctrines based partly on statutes and partly on the common law which have an important bearing on the matter.

1. As to recording acts it should be noticed in the first place that such laws relating to chattels are, from the nature of the case, far less satisfactory than is a similar system applied to real estate. Transactions in real estate are comparatively infrequent, and generally involve a considerable sum of money. It has always been customary to make some examination of the title of a seller or mortgagor of such property, and the time and money thereby expended are not a serious burden on the business of a community. On the other hand, at least in the case of ordinary sales of chattels, it never has been customary, and never will be, because of the expense and delay involved, to search records for the seller's title. Moreover, while it is always easy to determine with certainty where every existing encumbrance of land must be recorded, in the case of chattel property such certainty is never possible, since both the property and its owner may have moved from place to place. A sale in Boston may be invalidated by a mortgage recorded in another city. Doubtless chattel mortgages with the mortgagor in possession are necessary, but the evils with which they are necessarily accompanied are such as to give reason for hesitation in extending the right to make such mortgages beyond the requirements of the community.

The English Bills of Sale Acts,[1] as has been seen, unlike our recording acts, do not require every chattel mortgage to be recorded. If the transaction is written it must generally be recorded,[2] but it need not be written. As it is not a governing principle in the English legislation, as it is in ours, that every chattel mortgage must be recorded, it is natural that in England it should not be considered a fatal objection to a mortgage of future chattel property that effective record is difficult or impossible. In this country

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[1] Those now in force are 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35.

[2] 2 Encyc. of the Laws of England 129.

such an objection, if warranted by the facts, is more serious. That effective record cannot be made under the statutes in force in many states in this country is clear.[1] The residence of the mortgagor is the place most commonly fixed in the statutes as the place of record. Under such a statute, if a debtor mortgaged future property the mortgage would be recorded where he lived at the time the instrument was executed. When the property came into his possession he might be living in another place. Indeed, to be sure that property just acquired by his debtor did not immediately become subject to an old mortgage, a creditor would have to search the records in every place where the debtor had ever lived. This difficulty is met by statutes in some states requiring a new record when the mortgagor changes his residence. The remedy is not without its evils, however, for a mortgagee does not always know when a mortgagor changes his residence, and for the law to invalidate the lien of the mortgage, if the mortgagee fails to record promptly at the mortgagor's new residence, frequently acts as a premium offered to the mortgagor for stealing secretly away.

Other recording acts make record necessary in the place where the property is situated at the time of the conveyance. This requirement is sometimes exclusive and sometimes additional to the requirement of record at the mortgagor's residence. It is hard to see how a mortgagee of future property can comply with such a statute. Such property is not usually identified at the time the mortgage is made. Its *situs* and very existence are undetermined.

Some statutes require that chattel mortgages, in order to remain in force, must be refiled within a specified period, generally fixed at one year. This requirement more nearly meets the difficulties of the situation than any other. It is troublesome to the creditor, but by doing as the statute directs he can be sure of retaining his hold upon the property, and though the difficulties arising from the debtor's change of residence or the removal of the property are not wholly avoided, they are reduced within as narrow limits as seems possible.

There is one particular difficulty in the way of effective record inherent in mortgages of future property. A creditor will naturally assume that a lien upon specific property does not precede the acquisition of the property, and will not search records prior

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1 The American Statutes are collected in Jones, Chattel Mortgages, § 190 *et seq.*

to a time when he knew the property was acquired, yet the mortgage may antedate this time by any number of years.

If our recording acts are applicable, the result would naturally be that the mortgagee of future chattel property acquires a title superior not only to creditors of the mortgagor, but to purchasers for value from him, except in so far as such transfers may have been expressly or impliedly authorized by the mortgagee himself; for the record, if good for anything, operates as notice to all the world, and thereby makes the equitable right of the mortgagee as effective as a legal right. If, however, a mortgage is actually or constructively fraudulent, record would impart no additional validity to it.

2. The statutory and common law rules in regard to the necessity of delivery by the buyer, and forbidding retention of possession by the seller are based on the same general policy of the law that lies behind the legislation requiring chattel mortgages to be recorded. The possessor of chattel property is likely to be thought the owner, and to obtain credit on the faith of it. The law therefore limits, so far as may be, the dissociation of title and possession. If this policy is carried to its logical extreme the rule of the French civil code, "*en fait de meubles possession vaut titre*," [1] is the result. Even in France, however, this rule is not literally enforced,[2] and our law, of course, is very far from treating any possessor as capable of giving a good title. Nevertheless the tendency of the law is distinctly in the direction of giving to one who has been entrusted with possession the capacity of an owner,[3] and in favor of this tendency it is to be observed both that convenience of trade, which is always subserved rather by the certainty of the newly acquired title than by the protection of an anterior right, is promoted thereby, and also that it is fairer in a conflict between two innocent persons to prefer one who relied upon the ownership of the possessor of goods rather than one who voluntarily entrusted

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[1] Art. 2279.

[2] By exception in the article itself, one who has lost a chattel, or from whom it has been stolen, may reclaim it from any one for three years. As to the construction of the article see the annotated code of Sirey et Gilbert.

[3] A striking proof of this may be found in the English Factors' Act of 1889. Section 8 provides that a seller who has retained possession can make an effective sale or pledge of goods. Section 9 provides that a buyer allowed to take possession, though not having title, has the same power. Both provisions sharply changed the law of England. In this country without the aid of statutes the same result has been reached in many states on both these questions.

the possessor with the property. In this country the law is in a very confused state as to the extent to which delivery and continued possession are necessary to give to a purchaser a right indefeasible by creditors of the seller or a later purchaser from him; but it is probably safe to say that in a majority of states even a purchaser of the legal title of existing property will lose his rights if the goods are attached while still undelivered in the hands of the seller, or if the seller wrongfully makes another sale of the goods and delivers them to the subsequent purchaser.[1] In some states two separate doctrines exist, though one partially overlaps the other. One doctrine is that delivery, though not necessary to the transfer of title between seller and buyer, is essential to the validity of the title as against third persons; the other is that retention of possession by the seller is presumed to be a fraud upon the seller's creditors, and under the statute of 13 Eliz. c. 5 the transfer of title may be treated as a fraudulent conveyance and therefore void. The first doctrine protects both subsequent purchasers and creditors; the second, creditors only. The first is an absolute rule applicable without regard to circumstances making delivery difficult or impossible; the second is generally in this country as in England, simply a rule of presumption, and evidence showing the *bona fides* of the parties or the impossibility of transferring possession at once is admissible. In other states these two doctrines seem to have been consolidated, and statutes have been passed making a change of possession essential to the validity of a transfer.

3. Even though a mortgage of future goods with the mortgagor in possession does not conflict with the principles just considered, there are often provisions in such mortgages which are open to a narrower objection. Frequently the mortgagor is allowed to sell or otherwise dispose of the property which is the subject of the mortgage without any obligation to account for the proceeds or use them in buying other goods to be substituted for those sold. This is especially the case in mortgages of the stock in trade of a business. In England a mortgage with such a right to sell is said to give a "floating charge." As has been seen,[2] the validity of this is there recognized apart from statutory prohibition. In most jurisdictions of this country, however, a power given to the mortgagor to withdraw at will property from

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[1] See Williston's Cas. Sales (2d ed.) 384, n.

[2] See *supra*, p. 566.

the mortgage is a step beyond the limits imposed by the law of fraudulent conveyances, and such mortgages are invalid irrespective of whether a mortgage of future goods is generally effectual.[1] In some jurisdictions, however, such power is at most evidence of fraud.[2]

4. Since 1898 there has been a national bankruptcy law. Before that time, except for brief periods when former federal laws on the same subject were in force, the law of bankruptcy was settled by each state according to its individual taste. In a very few states there was legislation amounting in effect to a bankruptcy law, but this was exceptional.[3] There are two vital objects of bankruptcy legislation, one of which concerns the debtor, the other

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[1] Robinson *v.* Elliott, 22 Wall. (U. S.) 513; *Re* Marine Construction Co., 135 Fed. Rep. 921; Christian & Craft Co. *v.* Michael, 121 Ala. 84; Lund *v.* Fletcher, 39 Ark. 325; Martin *v.* Ogden, 41 Ark. 186; Gauss *v.* Doyle, 46 Ark. 122 (*cf.* Morton *v.* Williamson, 72 Ark. 390); Hall *v.* Johnson, 21 Col. 414; Rogers *v.* Munnerlyn, 36 Fla. 591; Lewiston Nat. Bank *v.* Martin, 2 Idaho 700; Greenebaum *v.* Wheeler, 90 Ill. 296; Mobley *v.* Letts, 61 Ind. 11; Davenport *v.* Foulke, 68 Ind. 382 (but the law is now otherwise in Indiana. Fletcher *v.* Martin, 126 Ind. 55, 57); Rathbun *v.* Berry, 49 Kan. 735; Humphrey *v.* Mayfield, 63 Kan. 208 (*cf.* Atchison Saddlery Co. *v.* Gray, 63 Kan. 79); Ross *v.* Wilson, 7 Bush (Ky.) 29; Horton *v.* Williams, 21 Minn. 187; Pabst Brewing Co. *v.* Butchart, 67 Minn. 191; Donohue *v.* Campbell, 81 Minn. 107; Joseph *v.* Levi, 58 Miss. 843; Johnston *v.* Tuttle, 65 Miss. 492; Hazlehurst Bank *v.* Goodbar, 73 Miss. 566; Barton *v.* Sitlington, 128 Mo. 164; State *v.* O'Neill, 151 Mo. 67, 87; Rocheleau *v.* Boyle, 11 Mont. 451; Buckstaff Mfg. Co. *v.* Snyder, 54 Neb. 538; Lutz *v.* Kinney, 24 Neb. 38; Locke *v.* New England Brick Co., 63 Atl. Rep. 178 (N. H.); Speigelberg *v.* Hersch, 3 N. Mex. 185; Hangen *v.* Hachemeister, 114 N. Y. 566; Mandeville *v.* Avery, 124 N. Y. 376; Zartman *v.* First Nat. Bank, 96 N. Y. Supp. 633 (App. Div. Sup. Ct.); Bergman *v.* Jones, 10 N. Dak. 520; Freeman *v.* Rawson, 5 Oh. St. 1; Enck *v.* Gerding, 67 Oh. St. 245; Will T. Little Co. *v.* Burnham, 5 Okla. 283; Aiken *v.* Pascall, 19 Ore. 493; Fisher *v.* Kelly, 30 Ore. 1; Tennessee Bank *v.* Ebbert, 9 Heisk. (Tenn.) 153; Rome Bank *v.* Haseltine, 15 Lea (Tenn.) 216; Moore *v.* Wood, 61 S. W. Rep. 1063 (Tenn. Ch.); Wilber *v.* Kray, 73 Tex. 533; McKibbon *v.* Brigham, 18 Utah, 78; Hughes *v.* Epling, 93 Va. 424; Garden *v.* Bodwing, 9 W. Va. 121 (*cf.* Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487); Blakeslee *v.* Rossman, 43 Wis. 116; Durr *v.* Wildish, 108 Wis. 401.

[2] Etheridge *v.* Sperry, 139 U. S. 266; Allen *v.* Windham Mfg. Co., 87 Fed. Rep. 786; *Re* Hull, 115 Fed. Rep. 858; Egan Bank *v.* Rice, 119 Fed. Rep. 107; *Re* Ball, 123 Fed. Rep. 164; Wardlaw *v.* Meyer, 77 Ga. 620; Phillips *v.* McChesney, 8 Hawaii 289; Clark *v.* Hyman, 55 Ia. 14; Meyer *v.* Evans, 66 Ia. 179; Blanchard *v.* Cooke, 144 Mass. 207, 226; Leland *v.* Collyer, 34 Mich. 418; Louden *v.* Vinton, 108 Mich. 313; Lister *v.* Simpson, 38 N. J. Eq. 438; Kreth *v.* Rogers, 101 N. C. 263; Williams *v.* Winsor, 12 R. I. 9; Marshall *v.* Crawford, 45 S. C. 189; Black Hills Co. *v.* Gardiner, 5 S. Dak. 246; Custer City Bank *v.* Calkins, 12 S. Dak. 411; Bartlett *v.* Walker, 65 Vt. 594; Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487; McCord *v.* Albany County Bank, 7 Wyo. 9.

[3] The legislation in force in the various states is classified in Williston's Cas. Bankruptcy, 6.

his creditors. The first is the discharge of the debtor; the second, the equal distribution of his property among his creditors. One of the means to effect the latter object is the portion of the law relating to preferences. Preference of one creditor over another by an insolvent debtor was not in violation of the common law,[1] and prior to 1898 was, therefore, not in violation of the law of most of the United States. Though now forbidden to the debtor and under certain circumstances recoverable from the creditor, both here and in England, the definition of what constitutes a preference differs strikingly in the countries. An essential requisite in England is that the debtor's dominant motive in making the payment in question should be a desire to prefer the creditor.[2] Therefore, if the payment was made because of pressure on the part of the creditor,[3] or in order to escape a criminal prosecution,[4] or to protect a surety from liability,[5] or to avoid the bar of the statute of limitations,[6] or to fulfil a supposed legal duty,[7] or to keep in good credit,[8] it is not a preference. So a valid security given in exchange for one intended to be valid, but not so in fact, is not a preference in England.[9] In this country, all such payments are preferences. The only question to be asked is, did the debtor pay an antecedent debt? Why he paid it is immaterial.[10] There can be little doubt that the American rule is the better, for it more fully carries out the general purpose of securing equality of distribution, and there is no natural equity which should protect payments which do in fact prefer and which were known to prefer, because the debtor was serving some end of his own in making the payment rather than merely intending to benefit the creditor. Moreover, the English rule is necessarily difficult to apply. It may some-

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1 14 Am. & Eng. Encyc. of Law (2d ed.) 226.

2 *Ex parte* Griffith, 23 Ch. D. 69; *Re* Eaton, [1897] 2 Q. B. 16.

3 Van Casteel *v.* Booker, 2 Exch. Rep. 691.

4 *Ex parte* Taylor, 18 Q. B. D. 295; Sharp *v.* Jackson, [1899] A. C. 419.

5 *Re* Mills, 58 L. T. N. S. 871.

6 *Re* Lane, 23 Q. B. D. 74.

7 *Re* Fletcher, 9 Mor. 8; *Re* Vingoe, 1 Man. 416.

8 *Re* Clay, 3 Man. 31.

9 *Re* Tweedale, [1892] 2 Q. B. 216.

10 Loveland on Bankruptcy, § 195. It is true that "intent to prefer" is necessary in order that the preference shall constitute an act of bankruptcy, and the creditor cannot be deprived of his preference unless he had reasonable cause to believe that such an intent existed; but it is rightly held that if an insolvent debtor, knowing the existing situation, pays a debt he must be presumed to intend the natural consequences of his act.

times be necessary for a court to try the question what was a man's dominant motive, but in the nature of the case the question is so doubtful that litigation is invited, and the result of the litigation will often depend on chance.

The bearing is plain of the doctrines which have just been considered upon the propriety of enforcing equitable liens on future property against creditors. If mortgages of existing goods are binding only between the parties unless recorded, the policy of the law must certainly require the same formality in the case of mortgages of future goods. Whether the difficulties of satisfactory record are so great as to make it undesirable to attempt to adjust a recording system to meet them is a question upon which opinions may differ. The terms of many recording acts as they at present exist seem inapplicable to mortgages of future goods.[1] In a jurisdiction of this sort the declared policy of the legislature to make record of mortgages of existing goods a condition of their validity would seem to make it improper for a court of equity to sustain a mortgage of future goods where there can be neither record nor change of possession. Where such mortgages are sustained record is generally required.[2]

The bankruptcy law may have a bearing on the subject in more ways than one. If a mortgagor of future goods becomes insolvent before the goods or all of them have become identified, the subsequent identification of the goods by the agency of the mortgagor, amounting as it does to a transfer of property, must be a preference and an act of bankruptcy on his part, and certainly if the mortgagee had reasonable cause to believe that the mortgagor was insolvent he could not retain the fruits of the preference. Thus, if one who has mortgaged a fluctuating stock of goods adds new goods to the stock from time to time, these new goods, according to the doctrine of Holroyd *v.* Marshall, are subjected to the lien of the mortgage. But if the mortgagor was insolvent at the time when these additions were made, he is guilty of a preference in making them, for obviously there was no lien of any kind on these goods

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[1] Jones *v.* Richardson, 10 Met. (Mass.) 481; Griffith *v.* Douglass, 73 Me. 532.

[2] Gregg *v.* Sanford, 24 Ill. 17; Hudson *v.* McKale, 107 Mich. 22; Hoyle *v.* Plattsburgh, etc., R. R., 54 N. Y. 322. But in Groton Mfg. Co. *v.* Gardiner, 11 R. I. 626, 629, it was held that a promise by a tenant that future goods should stand as security for future rent was valid without record. It is submitted that this decision is contrary to public policy, whether it is a correct interpretation of the Rhode Island statute or not.

until they were added to the stock. It is an act of bankruptcy for him to carry out a contract by transferring property in accordance with his contracts. If equity gives a property right under these circumstances, the debtor must in that case also be committing an act of bankruptcy. It does not seem right for equity thus to create a property right by treating as done what has been contracted to be done, when the debtor is forbidden by law to do it at that time.

Another limitation which our law of bankruptcy may impose upon the right to transfer future goods concerns the breadth of the description of the goods. The English cases have upheld mortgages which attempted to transfer little if anything less than all the property the mortgagor might have at any time while the debt should be unpaid. But in England, under their law of preference, a general promise of security given at the time a debt is contracted may be executed after the debtor has become insolvent; [1] while in this country, Judge John Lowell expressed the law when he said: "I have been accustomed to say that such an agreement merely amounts to an agreement to give a preference if one should become necessary." [2] How far different from this is an agreement that a creditor shall have a mortgage on all the future goods of the debtor, when the agreement is coupled with permission, express or implied, that any future goods which the debtor acquires he may deal with and dispose of as his own. Even aside from the bankruptcy law, as has been seen, such mortgages are often held to be fraudulent conveyances,[3] but when preferences are forbidden the objectionable character of the agreement is more apparent. The entire purpose of the agreement, it is obvious, is to allow the mortgagor unfettered control of his property unless he gets into financial difficulty. In that event the mortgagee will swoop down upon whatever property happens to be in the mortgagor's hands and claim a lien upon it.

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[1] Baldwin, Bankruptcy, 9th. ed., 125; *supra*, p. 572.

[2] *Ex parte* Ames, 1 Low. (U. S. Dist. Ct.) 561. In accord are Bank of Leavenworth *v.* Hunt, 11 Wall. (U. S.) 391; Rundle *v.* Murgatroyd, 4 Dall. (U. S.) 304; *Re* Connor, 1 Low. (U. S. Dist. Ct.) 532; Brett *v.* Carter, 2 Low. (U. S. Dist. Ct.) 458; Barrow *v.* Morris, 14 B. R. 371; Burdick *v.* Jackson, 15 B. R. 318; Lloyd *v.* Strobridge, 16 B. R. 197; *Re* Ronk, 111 Fed. Rep. 154; Holmes *v.* Winchester, 135 Mass. 299; Sebring *v.* Wellington, 63 N. Y. App. Div. 498. So a chattel mortgage of future property given when the mortgagor was insolvent and within four months of bankruptcy is a preference though the mortgage was given to comply with an oral agreement made six months before. *Re* Dismal Swamp Contracting Co., 14 Am. B. Rep. 175.

[3] *Supra*, p. 570.

What is this but an agreement to give a preference if one shall become necessary? The conditions already referred to that are found in the debentures of English companies, as for example that the mortgagor may deal with the property as its own until there has been default in the payment of the interest for three months or until an order or resolution for winding up, plainly show the intent and purpose of the agreement. In this country this intent and purpose clearly violate the law forbidding preferences, and are therefore illegal.

For some or all of the reasons here given mortgages of future chattel property of which the mortgagee is in possession are in many states held invalid against an attachment or levy by creditors.[1]

Mortgages of future property by corporations seem to have been treated in this country with somewhat more respect than similar mortgages made by individuals,[2] though the sharp distinction

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[1] Christian & Craft Co. *v.* Michael, 121 Ala. 84; Walker *v.* Vaughn, 33 Conn. 577; American Surety Co. *v.* Worcester Cycle Co., 100 Fed. Rep. 40 (Conn.); Gregg *v.* Sanford, 24 Ill. 17; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Fisher *v.* Syfers, 109 Ind. 514; Long *v.* Hines, 40 Kan. 216; T. B. Townsend Co. *v.* Allen, 62 Kan. 311; Ross *v.* Wilson, 7 Bush (Ky.) 29; Loth *v.* Carty, 85 Ky. 591; Manly *v.* Bitzer, 91 Ky. 596, 598; Griffith *v.* Douglass, 73 Me. 532 (*cf.* Sawyer *v.* Long, 86 Me. 541); Moody *v.* Wright, 13 Met. (Mass.) 17; Cooke *v.* Blanchard, 144 Mass. 207; Moors *v.* Reading, 167 Mass. 322; Tatman *v.* Humphrey, 184 Mass. 361; Brown *v.* Wiggin, 16 N. H. 312; Gardner *v.* McEwen, 19 N. Y. 123; Rochester Distilling Co. *v.* Rasey, 142 N. Y. 570; *Re* Marine Construction Co., 14 Am. B. Rep. 466 (N. Y.); Zartman *v.* First Nat. Bank, 96 N. Y. Supp. 633 (Sup. Ct., App. Div.) (*cf. Re* Sentenne & Green Co., 120 Fed. Rep. 436); Francisco *v.* Ryan, 54 Oh. St. 307. See also Hitchcock *v.* Hassett, 71 Cal. 331; Rowell *v.* Claggett, 69 N. H. 201; Girard Trust Co. *v.* Mellor, 156 Pa. 579, 590 (*cf.* Collins's App., 107 Pa. 590), and cases cited *supra*, p. 571, n. 1; also Civ. Code, La., § 3308.

In other states, however, the contrary is held. Hughes *v.* Wheeler, 66 Ia. 641 (good against a purchaser from the mortgagor); Riddle *v.* Dow, 98 Ia. 7; Hogan *v.* Atlantic Elevator Co., 66 Minn. 344 (good against a purchaser); Everman *v.* Robb, 52 Miss. 653; Smithurst *v.* Edmunds, 1 McCart (N. J.) 418; Cumberland Bank *v.* Bridgeton, 57 N. J. Eq. 231, 240; Stoll *v.* Sibson, 65 N. J. Eq. 552; Parker *v.* Jacobs, 14 S C. 112; Hirshkind *v.* Israel, 18 S. C. 157 (good against a purchaser); First Bank *v.* Turnbull, 32 Gratt. (Va.) 695; Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487. See also Sillers *v.* Lester, 48 Miss. 513. Mortgages of future property are expressly authorized by statute in Cal. C. C. § 2883; Idaho, C. C. § 2791; New Hampshire, Laws of 1901, c. 66; North Dakota, C. C. § 4705; Oklahoma, Statutes of 1893, § 3188; Wyoming, Rev. Stat. (1899) § 2805. In Maine and Michigan the mortgage is good against creditors if the future property is taken in substitution for existing property. Sawyer *v.* Long, 86 Me. 541; Eddy *v.* McCall, 71 Mich. 101; Ferguson *v.* Wilson, 122 Mich. 97. So in Georgia by statute, Code, Sec. 1954; see *infra*, p. 581, n. 5.

[2] Corporate mortgages of future property were held good against creditors in Pennock *v.* Coe, 23 How. (U. S.) 117; Shaw *v.* Bill, 95 U. S. 10; Pullan *v.* Cincinnati,

which has been drawn in England by statutes[1] does not exist. There are several grounds upon which a difference in degree, if not in kind, may be based. Corporations of some kinds, such as railroad corporations, mortgage all their property so habitually that those who deal with such corporations are not deceived by the possession of the corporation. Further, only corporations "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" are subject to involuntary bankruptcy. Railroad corporations and others not within the enumerated classes are, therefore, at liberty to prefer their creditors. Some decisions have also relied on the fact that the corporation in question was authorized to mortgage its property. This fact can, however, hardly warrant the conclusion that because a desirable mortgage cannot be made without mortgaging future property, the legislature must be held to have authorized the effective inclusion of such property.

It had been intimated in England, before the decision of Holroyd *v.* Marshall, that an agreement to mortgage future goods, coupled with an authority to take possession of the goods, would give the mortgagee a legal right to the mortgaged goods as soon as he took possession.[2] The correctness of this is evident, and under the English law of preference it can make no difference that the mortgagor was insolvent at the time that the mortgagee seized the goods. Not unless the mortgagor, with the dominant motive of giving the creditor an advantage, voluntarily delivered possession of the goods to the mortgagor could the transaction amount to a preference, even though it were admitted to the fullest extent that the original agreement gave no equitable interest in the property. Likewise in most states in this country, except while national bankruptcy acts have been in force, preferences have not been in any way forbidden. In such states, therefore, the same result is a matter of course.[3] But where, as in Massachusetts, for more than

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etc., R. R., 5 Biss. (U. S. C. C.) 237; Scott *v.* Clinton, etc., R. R. Co., 6 Biss. (U. S. C. C.) 529; Hodder *v.* Kentucky, etc., R. R. Co., 7 Fed. Rep. 799; Manhattan Trust Co. *v.* Sioux City, etc., R. R. Co., 68 Fed. Rep. 72; Jessup *v.* Bridge, 11 Ia. 572; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431; Bell *v.* Chicago, etc., R. R., 34 La. Ann. 785; Morrill *v.* Noyes, 56 Me. 458; Butler *v.* Rahm, 46 Md. 541; Williamson *v.* New Jersey, etc., R. R., 26 N. J. Eq. 398; Phila. W. & B. R. R. Co. *v.* Woelpper, 64 Pa. 366. See also Howard *v.* Iron & Land Co., 62 Minn. 298. But see *contra*, Locke *v.* New England Brick Co., 63 Atl. Rep. 178 (N. H.)

[1] See *supra*, p. 566.

[2] Lunn *v.* Thornton, 1 C. B. 679.

[3] Am. Surety Co. *v.* Worcester Cycle Co., 100 Fed. Rep. 40; *Re* Antigo Screen

fifty years a state insolvency law has forbidden preferences, or when, as has been the case since 1898, a national bankruptcy law prevails throughout the country, it is by no means so clear that seizure by the creditor when the debtor is insolvent would not be a preference, and that if the insolvency is known to the creditor and bankruptcy supervened within four months, the transaction would not be voidable.[1] In the early Massachusetts case of Moody *v.* Wright[2] the court, though deciding that the original agreement gave no equitable lien, intimated that a seizure by the creditor at any time before actual proceedings under the insolvency law would be valid. The court was influenced by the English case of Mogg *v.* Baker[3] on which it relied without observing the distinction, then not so well settled as now between the English and American law of preferences. In Chase *v.* Denny,[4] the Massachusetts court, following the earlier *dictum*, squarely held that the "taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor," gave the mortgagee a valid lien. The court said that it was "not the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract." The court here seems to have lost sight of the distinction between a property right and a contract right.

Door Co., 123 Fed. Rep. 249 (C. C. A.); Columbus Iron Works *v.* Renfro, 71 Ala. 577; Walker *v.* Vaughn, 33 Conn. 577; Gregg *v.* Sanford, 24 Ill. 17; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Fisher *v.* Syfers, 109 Ind. 514; Burford *v.* First Nat. Bank, 30 Ind. App. 384; Cameron *v.* Marvin, 26 Kan. 612; Leland *v.* Collver, 34 Mich. 418; Barton *v.* Sitlington, 128 Mo. 164; State *v.* O'Neill, 151 Mo. 67; McCaffrey *v.* Woodin, 65 N. Y. 459; Francisco *v.* Ryan, 54 Oh. St. 307; Cook *v.* Corthell, 11 R. I. 482; Moore *v.* Byrum, 10 S. C. 452; Peabody *v.* Landon, 61 Vt. 318; Thompson *v.* Fairbanks, 75 Vt. 361, 196 U. S. 516; Merchants' Bank *v.* Lovejoy, 84 Wis. 601. *Cf.* Alabama Bank *v.* Barnes, 82 Ala. 607; Bank of Eutaw *v.* Alabama Bank, 87 Ala. 163.

[1] In Humphrey *v.* Tatman, 198 U. S. 91, 92, Mr. Justice Holmes, speaking for the court, said: "We assume also, without deciding, that if, as against the trustee, the mortgage is to be regarded as first having come into being when the mortgagee took possession, it would be void. In the latter view the anomalous case would be presented of a mortgage of all a man's stock in trade to secure a past debt, executed to one who had reasonable cause to believe that the mortgagor was insolvent and that he was receiving a preference, but executed without intent to prefer on the part of the mortgagor. There would be a preference within the definition in § 60 *a*, and the mortgagee would know it, but he could not be said in a strict sense to have reasonable cause to believe that it was intended to give a preference. We assume, for purposes of decision, that such a case must be regarded as falling within the intent of the Act."

[2] 13 Met. (Mass.) 17.

[3] 3 M. & W. 195.

[4] 130 Mass. 566.

Unquestionably the mortgagee had the latter from the time of the original bargain, but a preference consists, not in making a present to a person who has no right, but in carrying out a contract on which there is merely personal liability. If the court meant to intimate that the mortgagee had a property right, the question then is, when did it arise? It could not arise until the property was identified and acquired by the mortgagor. That it did arise then is the doctrine of Holroyd *v.* Marshall, but this doctrine is denied by the Massachusetts court.[1]

The conception, indeed, is not only possible but reasonable that a property right arises, though for reasons of policy based on the apparent ownership of the mortgagor, the right cannot be asserted against creditors. The practical distinction between so limited a property right and a contract right would still have some importance. The mortgagee, if he has a property right, would be entitled to the remedies appropriate to the enforcement of such a right instead of being restricted to an action on the contract. Furthermore, the property right, though not binding upon creditors, would be binding upon one who took the property as a mere successor of the mortgagor. An assignee under a common law assignment is such a successor, and under the Bankruptcy Act of 1867 so was an assignee in bankruptcy.[2] Again, a purchaser with notice from the mortgagor would be bound by the mortgage if the mortgagee has a right of property, and so perhaps would a creditor who ad-

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[1] Moody *v.* Wright, 13 Met. (Mass.) 17; Blanchard *v.* Cooke, 144 Mass. 207; Moors *v.* Reading, 167 Mass. 322; Smith *v.* Howard, 173 Mass. 88.

[2] This distinction, taken between an assignee in bankruptcy as a mere successor of the bankrupt and an individual attaching creditor who is sometimes entitled to greater rights than his debtor, has been observed in several kinds of cases. An unrecorded chattel mortgage in Ohio was thus held in Gibson *v.* Warden, 14 Wall. (U. S.) 244, 249, effectual against an assignee in bankruptcy though it would not have been against an individual creditor.

In Massachusetts a similar distinction was taken in regard to property sold but not delivered. It might be attached by the seller's creditors (Dempsey *v.* Gardner, 127 Mass. 381; Hallgarten *v.* Oldham, 135 Mass. 1); but would not pass to his assignee in bankruptcy. Dugan *v.* Nichols, 125 Mass. 43. So, an unrecorded deed of real estate, at least prior to the present bankruptcy statute, though it would not protect the property against attachment, would be good against the assignee in bankruptcy. Smythe *v.* Sprague, 149 Mass. 310. The Massachusetts court, however, did not apply this doctrine to unrecorded chattel mortgages, even of existing property. Such mortgages, though upheld by the federal courts, were held ineffectual in the state courts against assignees in bankruptcy. Haskell *v.* Merrill, 179 Mass. 120, 124. As is presently shown (*infra*, p. 579), under the present Act the trustee in bankruptcy must get every right which an individual creditor could get.

vanced his money with knowledge of the mortgage. That there is such a property right seems generally to be the view even of those states which prefer a creditor's seizure to the mortgagee's right,[1] but in a few states the mortgagee's right is nothing more than a contract right. This is clearly the case in Massachusetts. The court of that state has expressly said of such a mortgage that it "is not one that is specifically enforced and it does not create a trust,"[2] and has enforced the view thus expressed by giving the mortgagee no greater rights against an assignee in bankruptcy than against an attaching creditor,[3] and by holding that a purchaser of chattels with notice of an unrecorded agreement to give a mortgage upon them has indefeasible title.[4] The law of Kentucky seems also to confine the mortgagee's rights strictly to those of contract.[5]

If the mortgagee's right is merely contractual, it should need no argument to prove that it is a preference for the mortgagor to fulfil it when insolvent or in any way to take part in a transfer of property to the mortgagee. And though the creditor seize the property by virtue of a power given to him at the time of the mortgage, the case, though not technically so clear, is within the mischief of the Act if not within the precise language, for there can be no doubt that bankruptcy legislation aims at nothing less than making all creditors share alike who have only contractual rights at the time of insolvency, except in so far as their rights may be satisfied by them when ignorant of the insolvency.

Even if the right be regarded as a property right which attaching creditors can defeat, the result is the same under the present Act. Section 70 a (5) provides that all property of the bankrupt passes "which prior to the filing of the petition . . . might have been levied upon and sold under judicial process against him."[6] Unless the mortgagee has got possession the trustee in bankruptcy must clearly prevail over him under this provision. Nor will it do for the debtor to turn the mortgagee's equitable right into a legal right by delivering possession. Equitable rights in property may be converted into legal rights, or enforceable rights of any charac-

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1 Patapsco Guano Co. *v.* Ballard, 107 Ala. 710, 716; Mallin *v.* Wenham, 209 Ill. 252, 259; Perry *v.* White, 111 N. C. 197; Williams *v.* Winsor 12 R. I. 9.

2 Blanchard *v.* Cooke, 144 Mass. 207, 225.

3 See cases cited *supra*, p. 578, n. 1.

4 Smith *v.* Howard, 173 Mass. 88. See *contra*, Dodge *v.* Smith, 5 Kan. App. 742.

5 Ross *v.* Wilson, 7 Bush (Ky.) 29.

6 See Chesapeake Shoe Co. *v.* Seldner, 122 Fed. Rep. 593 (C. C. A.); Haskell *v.* Merrill, 179 Mass. 120, 125; McFarlan Carriage Co. *v.* Wells, 99 Mo. App. 641.

ter may be changed into other enforceable rights of no greater value, when the debtor is insolvent and known to be so, but where no enforceable right in property exists it is a preference to give such a right. If the creditor takes the property himself the same question is presented as where he was regarded as having merely a contract right. In both cases, with knowledge of the insolvency, he is endeavoring to convert a right which will be of no avail in bankruptcy into one which is of value.

Under the present Bankruptcy Act, there are special reasons for treating the seizure by the creditor after known insolvency as forbidden. The Act makes it an act of bankruptcy passively to suffer a preference, and though it does not state in terms that any preference suffered may be recovered from one who took knowing of the insolvency,[1] that implication is no more than the courts have made with reference to another act of bankruptcy provided in the statute, — a general assignment. The statute does not say that the property may be recovered by the trustee in bankruptcy from the assignee. Yet it is held that he may do so, irrespective of any fraud in the general assignment.[2]

An attempt has been made to validate the seizure by the mortgagee by invoking a doctrine of relation.[3] The possession acquired by the mortgagee is said to relate back to the date of the mortgage. This, of course, is merely saying that though an essential element of the mortgagee's right has been acquired within the forbidden period, the contrary will be assumed, and that assumption will be acted on. Whether such fictions should ever be allowed as a means of evading the terms of a statute may well be questioned. Certainly, unless there are peculiar circumstances indicating that the case is not within the intent of the statute, and that natural justice requires the words of the enactment to be limited so as not to go beyond the intent, any such evasion is improper.

In view of the provisions just referred to of the existing Bank-

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[1] The case seems analogous, in this respect, to a case where a creditor within the four months' period with knowledge of his debtor's insolvency obtains a judgment and levies upon the debtor's property, and the officer actually pays over the amount of the claim. The effect of this does not seem to have been decided as yet. Loveland, in his treatise on bankruptcy, says, p. 568, "It would seem that property so paid to a judgment creditor might be recovered in a proper case under Sec. 60 b, as a preference created by a judgment."

[2] *Re* Gutwillig, 92 Fed. Rep. 337; *Re* Slomka, 122 Fed. Rep. 630; *Re* Knight, 125 Fep. Rep. 35.

[3] Thompson *v.* Fairbanks, 196 U. S. 516, 524.

ruptcy Act, the Supreme Court of Massachusetts held in a recent case[1] that its old rule no longer could prevail, and that the seizure by the creditor when he knew of the insolvency did not help him. The Supreme Court of Vermont, however, had held the contrary a short time before,[2] and its decision was later affirmed by the Supreme Court of the United States.[3] The Massachusetts case had also been carried to the higher court and was shortly thereafter reversed.[4] The effect of these decisions is that the Bankruptcy Act still leaves it open to the individual states to allow the acquisition of a lien by the mortgagee by taking possession at any time before actual bankruptcy, and it is immaterial that possession is taken with the mortgagor's consent. These decisions seem to the writer both to violate the spirit at least of the Bankruptcy Act, and to produce an undesirable result, but they must be regarded as establishing the law beyond question.

Thus far the question has been considered chiefly with reference to the mortgagor's creditors, but the standpoint of the mortgagor should also be considered. It is a hardship if one who owns property cannot borrow money on the security of it. The owner of a valuable stock in trade cannot raise money upon it and also continue his business unless the law provides some method for enabling him to do so. All that he wishes is to be treated as the owner of property which can be mortgaged to the extent of his existing stock, but in order to do business he must be allowed to sell what he has on hand and substitute other property. Nor will business exigencies make it easy, or even possible, to make changes of specific new property for each article of the existing stock as it is sold. It is possible sometimes to trace the proceeds of the sales of existing goods into the new goods afterwards purchased, but to the mind of the layman a stock in trade has a continuous existence as an entity irrespective of the articles which compose it. This idea has hardly been recognized by the common law, but it rests on a sound basis, and a desirable result in this class of cases cannot be reached without it. A statute, such as that existing in Georgia,[5] would provide for the difficulty. Record of such

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[1] Tatman *v.* Humphrey, 184 Mass. 361.
[2] Thompson *v.* Fairbanks, 75 Vt. 361.
[3] Thompson *v.* Fairbanks, 196 U. S. 516.
[4] Humphrey *v.* Tatman, 198 U. S. 91.
[5] Code, § 1954. A mortgage may be made of goods "in bulk, but changing in

a mortgage in the place where the stock in trade was would give reasonable notice to creditors, especially if occasional renewed record were required. The presumption of fraud arising from a right given the mortgagor to deal with mortgaged property as his own [1] is not fairly applied to a case where the mortgagor engages to keep the stock of goods up to a certain point. Though the mortgagor may in such a case sell any of the articles subject to the mortgage, there must continuously remain a security of the same substantial value and of the same general description.

In contrast with the case of a mortgage of a stock in trade, there seems no hardship if a man is not allowed to mortgage possible future acquisitions which are not substitutions for any existing property he may have. In such a case there seems no good reason for seeking to evade the difficulties of the case. Such a mortgage should not be good against purchasers, creditors, or a trustee in bankruptcy, at any rate unless the mortgagee in accordance with a power given to him at the outset has taken possession of the goods prior to bankruptcy. Were it not for the decisions [2] of the United States Supreme Court already referred to, the further qualification would be added that the possession must be taken by the mortgagee either without reasonable cause to believe the mortgagor insolvent or more than four months before the mortgagor's bankruptcy.

Special statutory provision might well be made, however, for corporate mortgages for a double reason. On the one hand, in order that such mortgages shall be fully effective it is frequently necessary to include future property, and on the other the public

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specific." New goods are covered by the mortgage only to the extent of keeping up the original stock. Chisholm *v.* Chittenden, 45 Ga. 213; Anderson *v.* Howard, 49 Ga. 313. To this extent the future goods are covered though bought on credit and unpaid for. Goodrich *v.* Williams, 50 Ga. 425. See further, Ainsworth *v.* Mobile Fruit Co., 102 Ga. 123. In Ferguson *v.* Wilson, 122 Mich. 97, the mortgage in question covered specific chattels, and also " all other personal property, that may be owned or acquired during such years. The court held that no lien was created by these words as against either purchasers or creditors, and distinguished earlier decisions which had sustained the validity of mortgages of future goods on the ground that in the case at bar the property "was not connected with the business in which the mortgagor was engaged" and "had no relation to that in possession of the mortgagor at the time of giving the mortgage."

The same distinction is taken in Mississippi Fidelity Co. *v.* B. F. Sturtevant Co., 38 So. Rep. 783.

[1] See *supra*, p. 570.

[2] Thompson *v.* Fairbanks, 196 U. S. 516; Humphrey *v.* Tatman, 198 U. S. 91.

are much less likely to be deceived than in the case of mortgages by individuals.[1]

The whole subject is in so confused a state upon the authorities and its proper solution depends so much on rules of policy that a statute regulating the rights of the parties offers the best solution of the difficulties. If a uniform law could be passed in a number of states the gain would be greater.

A few words may be added in regard to attempted transfers of future personal property otherwise than by mortgage. So far as concerns the propriety of enforcing specifically a contract to give a pledge the reasoning applicable is identical with that appropriate to the case of a contract to give a mortgage. Damages are an inadequate remedy. It seems probable that the English law would recognize that an agreement to pledge future property creates an equitable lien upon the agreed property when it becomes specified.[2] Such an agreement, however, if written, seems within the statutory definition of a bill of sale,[3] and therefore the prohibition of bills of sales of future goods already considered in dealing with contracts to mortgage applies also to contracts to pledge. In this country the rules that require transfer of possession or record of mortgages of chattel property are also generally applicable. A pledge of existing goods derives its efficacy from the possession of the pledgee. Whatever may be the effect of permission to the pledgor to have possession for a temporary and special purpose,[4] there can be no doubt that the unqualified entrusting of the pledge to the pledgor would destroy the pledgee's security, so far as concerned innocent third persons, whether creditors or purchasers. Equity cannot give a greater effect to a promise to pledge future goods than to a pledge of existing goods of which possession has been surrendered upon the promise of the pledgee still to regard them as security for the debt and to return them upon demand. The situation in the two cases is the same as soon as the future goods come into existence, and before that time there can of course be no question of lien. The decisions, though not numerous, support this view.[5]

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[1] There are such statutory provisions in Connecticut and Utah. Conn. Stat. Rev. 1892, § 3806; Utah, Rev. Stat. (1898) § 444.

[2] See Martin *v.* Reid, 11 C. B. N. S. 730; Langton *v.* Waring, 18 C. B. N. S. 315, where agreements to pledge or charge existing property not delivered were sustained.

[3] 41 & 42 Vict. c. 31, § 4.

[4] See Jones on Pledges, § 44.

[5] Casey *v.* Cavaroc, 96 U. S. 467; Nisbit *v.* Macon Bank, 12 Fed. Rep. 686; *Re*

The reasons justifying a court of equity in taking jurisdiction of a contract to mortgage or pledge personal property obviously do not apply to a contract to sell such property. Nevertheless it seems to have been generally assumed that equity would protect the right of a buyer if he had paid the price or part of it.[1] The vagueness of the reasoning of the court in Holroyd *v.* Marshall and later decisions made it easy to suppose that an agreement to transfer by way of sale stood on all fours with an agreement to transfer by way of mortgage. The two English decisions[2] which protect the buyer do so not by enforcing the transfer of the property which was promised him, but by giving him a lien on the property for the restoration of the price, but in the first of these cases the court found apparently that such a lien had been contracted for. These decisions are certainly insufficient basis on which to support a doctrine that consideration paid for specified property may be recovered if the property is not transferred and that the property itself stands as security for the enforcement of the right. It is true that if the promisor becomes bankrupt his estate has both the goods and the price for them, but it would be an extreme doctrine in bankruptcy law to hold that this unjust enrichment of the bankrupt estate justifies specific reparation. Every creditor of a bankrupt estate has parted with his money in return for a promise which has not been kept. All are alike in suffering this injustice, and the fact that what one creditor gave or was to receive is capable of identification seems no reason in natural justice why he should be preferred over others whose money has gone perhaps to swell the estate but who cannot trace what they gave or identify what they were promised in return.

Another reason has been suggested for giving the vendee of future personalty in some cases at least a lien upon the property. In a few cases[3] the insolvency of the seller has been stated as a

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Sheridan, 98 Fed. Rep. 406; Sabin *v.* Pond, 98 Fed. Rep. 974; *Re* Klingman, 101 Fed. Rep. 691; Hitchcock *v.* Hassett, 71 Cal. 331; City Ins. Co. *v.* Olmstead, 33 Conn. 476; Copeland *v.* Barnes, 147 Mass. 388; Rowell *v.* Claggett, 69 N. H. 201. But see Hook *v.* Ayers, 80 Fed. Rep. 978 (C. C. A.); Huntington *v.* Sherman, 60 Conn. 463, 467; Keiser *v.* Topping, 72 Ill. 226; Tuttle *v.* Robinson, 78 Ill. 322.

[1] Benjamin so states the law, § 81. See also Hamilton *v.* Nat. Loan Bank, 3 Dill. (U. S. C. C.) 230; Post *v.* Corbin, 5 B. R. 11; Scammon *v.* Bowers, 1 Hask. (U. S. C. C.) 496.

[2] Langton *v.* Waring, 18 C. B. N. S. 315; Young *v.* Matthews, L. R. 2. C. P. 127.

[3] Doloret *v.* Rothschild, 1 Sim. & St. 590, 598; Dowling *v.* Betjemann, 2 John. & H.

possible ground for enforcing specifically a contract to sell goods of a sort not ordinarily within the jurisdiction of equity, and these suggestions have been adopted in one Illinois decision.[1] If the seller is insolvent, obviously a judgment for damages will not adequately protect the buyer, but on the other hand the law regarding delivery and retention of possession, and also the law of bankruptcy, materially qualify if not destroy the right of a court of equity to enforce the promise. As to delivery and retention of possession it is obvious that a promise to sell future goods can surely have no greater effect than an actual sale of existing goods, so that at least it may safely be said that wherever the latter transaction would not be valid without delivery against creditors of the seller or against purchasers from him, the effect of the former transaction must equally be limited.

But it is the law of bankruptcy that most clearly shows the error of basing an equitable lien on the insolvency of the vendor. Insolvency is the very circumstance which makes it improper for the seller to carry out his contract. Even against the seller himself, when no creditors or purchasers from him have complicated the situation, it cannot be permissible for a court of equity to decree specific performance on the ground of his insolvency in this country while a statute like the present Bankruptcy Act is in force. To do so is nothing less than ordering the defendant to commit an act of bankruptcy; for, since insolvency is regarded as a necessary basis of the equity, until insolvency there is but a contractual obligation, and to satisfy such an obligation is an act of bankruptcy under the present statute, as under the Bankruptcy Act of 1867. Even more clearly, if the rights of creditors or of a trustee in bankruptcy have in fact attached, a court of equity cannot be justified in attempting, in violation not only of the maxim that equality is equity, but also of the spirit if not the letter of a binding statute, to give property to a specific creditor when the only reason for so doing is insolvency, the very state of affairs which is the foundation for proceedings in bankruptcy and the division of the property among all creditors alike.

Samuel Williston.

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544; Dilburn *v.* Youngblood, 85 Ala. 449, 451; Treasurer *v.* Commercial Co., 23 Col. 390, 393; Williams *v.* Carpenter, 14 Col. 477; Ames *v.* Whitbeck, 179 Ill. 458, 475; Allen *v.* Freeland, 3 Rand. (Va.) 170, 174; Avery *v.* Ryan, 74 Wis. 591, 600.

[1] Parker *v.* Garrison, 61 Ill. 250.